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Robt Ferguson

August 8. 1766.

UNTO the RIGHT HONOURABLE,

The LORDS of COUNCIL and SESSION,

THE

PETITION

OF

ROBERT FERGUSON of *Isle*,

HUMBLY SHEWETH,

THAT, upon the 9th of June 1663, James Grierſon of Dalgoner granted a wadſet to Mr William Black, then miniſter at the Kirk of Dalgarnock, of ten acres of land, or thereby, called the Vicarage Kirk-land of the Kirk-ſtyle at the Old Kirk of Dunſcore, within the ſhire of Dumfries, for the ſum of 900 merks Scots.

By the contract of wadſet the lands are declared to be redeemable by payment of the wadſet-ſum, at any term of Whitſunday or Martinmas Even, upon a premonition of 40 days. The place of redemption appears likeways to have been fixed to the pariſh-kirk of Dunſcore, tho', by an evident vitiation, the word *Dumfries* is now ſubſtituted in its place; and, in caſe of abſence or refuſal, the wadſet-ſum was allowed to be conſigned in the hands of the Provoſt or Bailies of Dumfries.

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To this wadſet the petitioner has right as heir ſerved and retoured to his father Mr Alexander Ferguſon, who, in conſequence of a conveyance from Mr Thomas Black the ſon and heir of the original wadſetter, was infeft in the lands in the year 1694; and he has great reaſon to believe, that the right of reverſion has been long ago diſcharged, tho' hitherto he has not been able to recover ſufficient evidence of that fact.

The ſaid James Grierſon the reverſer, who was in labouring circumſtances at the time when this contract of wadſet was executed, having died ſoon thereafter, the ſucceſſion to his eſtate was eſteemed hazardous, and no title whatever was made up to it by any perſon as heir: However, upon the 8th October 1679, a diſpoſition of the eſtate of Dalgoner, and particularly of the ten acres wadſet as above, was granted by one William Grierſon, under the character of eldeſt ſon and apparent heir to the ſaid James Grierſon, in favour of James Grierſon, lawful ſecond ſon to James Grierſon of tutor of Lag; which diſpoſition proceeds upon a narrative, "That the diſponer, in the diſpenſation of providence, through infirmity of body, was not "habile to manage the eſtate and affairs of his ſaid umquhile father, and defray the debts and burdens may be "charged thereon."

In this ſhape matters lay over till the year 1696, when James Grierſon the diſponee led an adjudication in implement againſt the ſaid William Grierſon the diſponer. This adjudication bears, That the ſaid William Grierſon had been charged to enter heir in ſpecial to James Grierſon of Dalgoner his father, and his goodfire, and his grandfire; and although the ſummons ought to have bore the date of ſigneting of the letters of ſpecial charge, the meſſenger's name, and the date of the execution; yet it mentioned neither of theſe particulars; for in the decreet of adjudication produced, a blank

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is left in the recital of the ſummons for the date of the letters; another blank for the date of the execution; a third blank for the name of the meſſenger; and a fourth and fifth blank for the names of the defender's grandfather and great-grandfather; and in the production, as marked in this decreet, the letters of ſpecial charge and executions are ſaid to have been produced "as of the date, tenor, and contents "above mentioned;" that is, as mentioned in the libel.

James Grierſon now of Dalgoner ſerved himſelf heir in general to the adjudger; and having thereupon expede a charter of adjudication, he, upon the 4th of April 1765, premoniſhed the petitioner to receive the wadſet-ſum upon the 27th of May thereafter. But the petitioner having objected, not only to Mr Grierſon's titles, but likewiſe to the order of redemption that was uſed by him in conſequence of this premonition, he conſigned the money in the hands of one of the bailies of Dumfries, and brought an action before this court, for having it found and declared, That the wadſet-lands were redeemed as at Whitſunday 1765.

This action having come in courſe before the Lord Auchinleck Ordinary, it was objected for the petitioner, 1*mo*, That there was no proper title in the purſuer's perſon, on account of the nullities pleadable againſt his adjudication. And, 2*do*, That, ſuppoſing his title to be good, the order of redemption uſed by him was not in terms of the contract of wadſet; ſeeing that the petitioner was required to attend upon Monday the 27th of May 1765, in the pariſh-kirk of Dumfries; whereas, by the contract of wadſet, the redemption ought to have been made within the pariſh-kirk of Dunſcore upon Whitſunday Even. And a minute of debate having been made up by the clerk, in which, by a miſtake, he had marked the petitioner's procurator as agreeing to receive the money at Edinburgh, the Lord Ordinary pronounced the following interlocutor: "Having conſidered "the foregoing debate, repells the objection to the purſuer's "title;

" title; but ſuſtains the objection to the order of redemp-
" tion, ſo far as to prevent its taking effect at Whitſunday
" laſt: But finds the order already uſed ſufficient for re-
" deeming the lands libelled at the term of Whitſunday
" next; and, of conſent of the defender, finds it is to be
" at in Edinburgh, by payment
" of the ſum for which the lands are redeemable, or con-
" ſignation thereof in the hands of the clerks of ſeſſion, to
" be made forthcoming to the defender upon his producing
" a proper title to the wadſet-right in his perſon, and grant-
" ing proper acquittances and renunciations thereof; and
" decerns and declares accordingly."

Againſt this interlocutor the petitioner preferred a repreſentation; and anſwers being made thereto by the purſuer, the Lord Ordinary pronounced another interlocutor upon the 28th of July laſt, in the following terms: " The Lord
" Ordinary having again conſidered this repreſentation,
" with the anſwers, and ſpecially that the adjudication ob-
" jected to is in implement of a diſpoſition, and that the
" objection is not moved by the heir of William Grierſon,
" or by any of his creditors claiming right to the reverſion,
" which is adjudged, adheres to the interlocutor repelling
" the objections to the purſuer's title; and alſo adheres to
" the ſecond point of the interlocutor, finding the order of
" redemption uſed ſufficient for intitling the purſuer to in-
" ſiſt in the redemption; and, in reſpect the defender denies
" he conſented to the money being paid at Edinburgh, and
" inſiſts on the redemption being made *in forma ſpecifica*, ap-
" points the money to be paid at Dumfries; but prorogates
" the term of payment to Martinmas firſt; on which term-
" day appoints the purſuer to pay the ſame to the defender
" any time between the hours of twelve and two o'clock;
" and the defender to produce, at the ſame time, a ſuffi-
" cient title to the wadſet in his perſon; and to grant a
" renunciation thereof to the purſuer; which, if he fails

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"to do, allows the purſuer to conſign the wadſet-ſum in the "hands of the provoſt or any of the bailies of Dumfries; "and, upon his doing ſo, declares the lands to be redeem-"ed; and appoints the defender to cede the poſſeſſion of "the ſame to the purſuer, that he may enter thereto at the "ſaid term of Martinmas firſt."

Of theſe interlocutors the petitioner humbly prays your Lordſhips review.

And, in the firſt place, he apprehends, that the purſuer has produced no ſufficient title to the reverſion, in reſpect there is no evidence that the adjudication upon which he founds proceeded upon a ſpecial charge; for although the decreet bears the production of the letters of ſpecial charge, as of the date, tenor, and contents mentioned in the libel, it appears, that neither the date, tenor, nor contents were therein recited.

The only anſwer attempted to be made to this was, that the ſummons has probably been made out when the letters of ſpecial charge and the executions were not at hand, and that blanks have been left for the dates and for the meſſenger's name, which, through the neglect of the party's doer, have been omitted to be filled up in the libel before extracting the decreet.

But if conjectures of this kind are to be liſtened to, it will be difficult to know where to ſtop, and all forms may be entirely given up. It is impoſſible to believe, that the letters of ſpecial charge and the executions would have been narrated in this manner, had any ſuch been produced. For the extracter would have taken care either to fill up the blanks in the libel, or mark the date and ſigneting of the letters, and date and tenor of the executions in the production, and referred to them, as in the libel where all is blank.

In the next place, your Lordſhips will be informed, that the bill of the ſummons of adjudication is at this day blank as to the lands, as appears from the records in the

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ſignet-office, where the petitioner has cauſed it to be examined. The purſuer was indeed pleaſed to contend, that as the adjudication in queſtion was in implement of the diſpoſition, in the narrating of which the lands fell to be mentioned, there was leſs matter although a blank was left for them in the bill, and that blank omitted to be filled up when they came again to be repeated. But it might with equal propriety be argued, that, becauſe in an ordinary adjudication for payment of a debt, the grounds of debt are particularly narrated in the beginning of the ſummons, it would be no objection that a blank was left for the accumulate ſum.

The Lord Ordinary ſeems, by his laſt interlocutor, to have conſidered theſe objections to be ſolid, ſeeing that the *ratio decidendi* therein given for repelling them is merely founded upon this circumſtance, that they are not moved by the heir of William Grierſon, the granter of the diſpoſition, in implement of which the adjudication was led, or by any of his creditors. The petitioner however ſubmits it to your Lordſhips, if he has not an unqueſtionable right to ſtate theſe objections equally with the heir of William Grierſon, or any of his creditors, were they to appear in the field and claim a right to the reverſion which is now attempted to be carried by this adjudication.

A wadſetter is entitled to retain the poſſeſſion of the lands wadſetted until they be redeemed in terms of the clauſe of redemption therein contained, by the perſon who has right to the reverſion. It muſt therefore be competent to every wadſetter to object to the titles of thoſe who pretend to redeem the lands, by following out the order of redemption preſcribed in the contract.

Thus, where lands deſtined to heirs-male happen to be given in wadſet, the wadſetter would be allowed to object, want of title, if the heirs of line were to attempt to redeem, altho' no appearance or objection ſhould be made upon the part of the heirs-male. In like manner, where the right of

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reverſion is aſſigned to a third party by a diſpoſition of the wadſetted lands, the wadſetter will be at liberty to maintain himſelf in the poſſeſſion againſt the diſponee, by pleading a nullity or defect in the diſpoſition, altho' no objection ſhould be made to it upon the part of the diſponer. And upon the ſame principles, it muſt be equally competent to him to object to an adjudication in implement, when founded upon as a title of redemption, although no objection to that adjudication be moved by the heirs or creditors of that perſon in implement of whoſe diſpoſition it was led.

But even ſuppoſing the purſuer's title to be unexceptionable, the petitioner humbly apprehends, that this proceſs muſt fall to the ground, in reſpect that the order of redemption was not uſed in terms of the contract of wadſet.

It has already been mentioned, that the place fixed by the contract for redeeming the lands by payment of the wadſet-ſum, was the pariſh-kirk of Dunſcore; but the petitioner was premoniſhed to receive his money at the pariſh-kirk of Dumfries. It is true indeed, that in the clauſe of reverſion, there has been ſome late manufacture; for the old word *Dunſcore* which may ſtill be ſeen, has been altered into *Dumfries*.

The purſuer, in order to obviate this objection, contends that the word *Dunſcore* has been originally wrote through miſtake, and has been immediately corrected by the ſame hand; and to make his allegation, that Dumfries was the place propoſed by the parties for redeeming the lands, by making payment of the wadſet-ſum, the more probable, he refers to an after part of the clauſe, where, in the caſe of abſence or refuſal, the reverſer was to conſign the money "in the hands of the Provoſt, or any of the Bailies of the "*ſaid* burgh of Dumfries." From which he argues, 1*mo*, That it would have been to no purpoſe to have made the magiſtrates of Dumfries conſignatars, if the conſignation was to be at the pariſh-kirk of Dunſcore where it could not be expected they could attend. And, 2*do*, That as the

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words *ſaid* borough of Dumfries could not have been uſed, if that borough had not been mentioned in the preceeding part of the contract, it muſt follow of conſequence, that the pariſh-kirk of Dumfries was fixed on by the parties, as the place where the wadſetter was to be premoniſhed to receive his money.

But, in anſwer to this, your Lordſhips will, in the firſt place, obſerve that the petitioner does not inſiſt, that the pariſh-kirk of Dunſcore was the place where the conſignation was to be made in the event of the wadſetter's abſence, or refuſal to take his money. What he contends for only, is, that this pariſh-kirk was the place where, by the contract, the waddſetter agreed to take his money, and ſtipulated it to be paid; and as it is extremely common to appoint the conſignation to be made in a different place from that where the money muſt be firſt offered, ſo it was very natural, in the preſent caſe, to appoint the money to be conſigned in the hands of the magiſtrates of Dumfries, as they muſt have been ſuppoſed more proper to be entruſted with it than any perſons to be found in the neighbourhood of Dunſcore, a country-pariſh.

In the next place, the obſervation drawn from the word *ſaid*, does not apply; becauſe Dumfries being the place where the contract was executed, it was mentioned in the very firſt line of that contract; and when it came to be named again, fell properly to be denominated, the *ſaid* borough of Dumfries. Beſides, if criticiſms of this kind are to be liſtened to by your Lordſhips, they will be found to ſtrengthen the petitioner's plea; becauſe, in the after part of the contract, where the wadſetter is taken bound to relieve the reverſer of ſix pounds yearly due to the miniſter ſerving the cure at the kirk of Dunſcore, it is called the *ſaid* kirk of Dunſcore, plainly referring to the former part of the deed, where it is fixed upon as the place of redemption.

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Another objection againſt this order of redemption is, That the petitioner was premoniſhed to "compear and attend upon Whitſunday eve next to come, being the 27th "day of May next enſuing, being the next lawful day after "the legal term of Whitſunday Old Stile." Now, without inſiſting that the 15th day of May is the legal term of Whitſunday, the petitioner apprehends, that, upon the ſuppoſition that the 26th day of May New Stile was to be conſidered as the proper day for uſing the order of redemption, he ought to have been premoniſhed upon the day preceeding, in reſpect that in the year 1765 the 26th of May happened upon a Sunday, and that the premonition to appear upon the day following had no foundation in the contract.

Such being the objections to the order of redemption, it is humbly thought, that the petitioner ought to be altogether aſſoilzied. It has always been underſtood to be the law of this country, that conventional reverſions fall to be ſtrictly interpreted; and that being the caſe, it would ſeem that any deviation in uſing the order of redemption from the preciſe terms of the reverſion ſhould be fatal to a declaratory proceſs of this kind.

May it therefore pleaſe your Lordſhips to alter the Lord Ordinary's interlocutors, and to ſuſtain the objections to the purſuer's title; or, at any rate, to find, That he has not obſerved the order of redemption preſcribed by the contract of wadſet; and therefore to aſſoilzie the petitioner.

According to Juſtice, &c.

ALEX. WIGHT.

THE

PETITION

OF

ALEXANDER ORME, Writer to the Signet,
George Richardson, Writer in Edinburgh, and
Robert Gray, Writer there,

Humbly sheweth,

THAT in the Year 1775, a Marriage was contracted between the deceased Lyon Campbell, commonly called on the one Part, and on the other Part, the now also deceased David Cunyngham, younger of Burnhead; Merchant in Edinburgh, his eldest Son, Thomas Grame of Balgowan, lately deceased, and the deceased Robert Grame Burgher-german to John Grame of Balgowan; whereby, the three Parties last named, bound and obliged to pay to the said David Cunyngham, elder, an Annuity of 150 Merks yearly, during his Life.

The Reason of this Obligation was, that Burnhead had demanded himself of his Estate in favours of his Son, who had at that Time married; and he relyed to himself, out of his Estate, no more than the Annuity above mentioned, for Payment of which, Balgowan and Gray became bound, with David Cunyngham, as Cautioners for him.

In